STATE OF ALASKA

IBLA 85-541 Decided January 14, 1987

Appeal from a decision of the Alaska State Office, Bureau of Land Management, in part summarily dismissing State protest, holding Native allotment application to be legislatively approved and rejecting State selection application. A-61299 and A-63034.

Set aside and remanded.

1. Alaska: Native Allotments -- Alaska National Interest Lands Conservation Act: Native Allotments -- Contests and Protests: Generally -- Rules of Practice: Protests

   A State protest of a Native allotment application filed pursuant to sec. 905(a)(5)(B) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1634(a)(5)(B) (1982), will be considered sufficient to require the adjudication of the application pursuant to the Act of May 17, 1906, as amended, where it identifies in part, with some particularity, a public interest in access to public lands, resources, or bodies of water which could be jeopardized by confirmation of the allotment application.

2. Alaska: Native Allotments -- Alaska National Interest Lands Conservation Act: Native Allotments -- Contests and Protests: Government Contests

   Where a Native allotment application cannot be legislatively approved pursuant to sec. 905(a)(1) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1634(a)(1) (1982), and there are disputed issues of material fact regarding the applicant's use and occupancy of the land, BLM will be required to initiate a Government contest so that these issues can be resolved at a hearing.

APPEARANCES: Lance B. Nelson, Esq., Office of the Attorney General, State of Alaska, Anchorage, Alaska, for appellant; Tred Eyerly, Esq., Anchorage, Alaska, for Native allotment applicant; Dennis J. Hopewell, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

The State of Alaska has appealed from a decision of the Alaska State Office, Bureau of Land Management (BLM), dated February 21, 1985, summarily dismissing a State protest of George E. Williams' 1/ Native allotment application (A-61299), holding the Native allotment application was legislatively approved and rejecting State selection application A-63034 to the extent of the conflict.

On May 21, 1964, George E. Williams filed a Native allotment application for 160 acres of unsurveyed land situated in sec. 25, T. 29 S., R. 58 E., and sec. 30, T. 29 S., R. 59 E., Copper River Meridian, Alaska, pursuant to section 1 of the Act of May 17, 1906, as amended, 43 U.S.C. § 270-1 (1970) (repealed by section 18(a) of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. § 1617(a) (1982), on December 18, 1971, subject to pending applications). On June 26, 1968, Williams filed evidence of use and occupancy of the land, which is on the Chilkoot River between Chilkoot Lake and Lutak Inlet, near Haines, Alaska, claiming hunting and trapping "each year from 1950 to 1963." In a land report dated January 8, 1974, a BLM examiner recommended rejection of the Williams allotment application because there was "no evidence of use" of the land by the applicant and the applicant had not claimed any use since 1963. By decision dated December 3, 1975, BLM rejected the Williams allotment application because of the absence of clear and credible evidence that the applicant had used and occupied the land, as required by section 3 of the Act of May 17, 1906, as amended, 43 U.S.C. § 270-3 (1970) (repealed by section 18(a) of ANCSA on December 18, 1971). In John Moore, 40 IBLA 321 (1979), the Board set aside the December 1975 BLM decision and remanded the case to BLM for initiation of a Government contest proceeding in accordance with the court's decisions in Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976), and Pence v. Andrus, 586 F.2d 733 (9th Cir. 1978).

On December 2, 1980, Congress enacted the Alaska National Interest Lands Conservation Act (ANILCA). Section 905(a)(1) of ANILCA, 43 U.S.C. § 1634(a)(1) (1982), provides that, with certain exceptions and subject to valid existing rights, Native allotment applications pending on or before December 18, 1971, for land which was unreserved on December 13, 1968, were "approved" on the 180th day following December 2, 1980. However, section 905(a)(5) of ANILCA, 43 U.S.C. § 1634(a)(5) (1982), provides that a Native allotment application is not legislatively approved and must be adjudicated "pursuant to the requirements of the Act of May 17, 1906," where on or before the 180th day following December 2, 1980:

> (B) The State of Alaska files a protest with the Secretary stating that the land described in the allotment application is necessary for access to lands owned by the United States, the

1/ Williams died on Mar. 13, 1970. The Native allotment application is being pursued by his heirs.

> State of Alaska, or a political subdivision of the State of Alaska, to resources located thereon, or to a public body of water regularly employed for transportation purposes, and the protest states with specificity the facts upon which the conclusions concerning access are based and that no reasonable alternatives for access exist * * *.

On Monday, June 1, 1981, the State filed a protest of the Williams allotment application asserting, in the words of the statute, that the land is "necessary" for public access. 2/ The protest alleged the land is used for an existing highway, boat launch, and trail, and provides access to "sport and subsistence fishing, ADF&G [Alaska Department of Fish and Game] weir cabin." 3/ The protest stated there is no reasonable alternative for access because of an "existing constructed public access route, transportation facility or corridor."

In its February 1985 decision, BLM summarily dismissed the State's June 1981 protest because it "fail[ed] to provide the specific facts upon which the conclusions concerning access are based." BLM also stated allotment application A-61299 was legislatively approved by section 905(a)(1) of ANILCA and a certificate of allotment would be issued after survey of the land. BLM also rejected State selection application A-63034, filed August 10, 1965, pursuant to section 6(b) of the Act of July 7, 1958, P.L. 85-508, 72 Stat. 340 (1958), to the extent of the conflict with the allotment application. 4/

In its statement of reasons for appeal, the State contends its June 1981 protest was sufficiently specific to satisfy the requirements of section 905(a)(5)(B) of ANILCA and BLM was, therefore, required to adjudicate the Williams allotment application. The State argues the statutory requirement of specificity should be interpreted in light of the relatively short period (180 days) afforded the State for filing protests following passage of ANILCA, 5/ and the stated purpose for the specificity requirement, i.e., "to reasonably

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2/ The document was filed on the 181st day. However, the 180th day was Sunday. The document was filed in a timely manner pursuant to 43 CFR 1821.2-2(e).

3/ The State had filed another protest on May 12, 1981, pursuant to section 905(a)(5) of ANILCA, because the allotment application "appear[s] to conflict with lands which have been patented to the State of Alaska." BLM summarily dismissed that protest by decision dated Jan. 18, 1982. No appeal was filed.

4/ State selection application A-63034 had been tentatively approved in part by BLM decision dated Feb. 4, 1981. However, the land in application A-61299 was excluded from the tentative approval. Title to the remaining land, which was subject to the tentative approval, is deemed to have "vested" in the State pursuant to section 906(c) of ANILCA, 43 U.S.C. § 1635(c) (1982). State of Alaska v. Thorson (On Reconsideration), 83 IBLA 237, 91 I.D. 331 (1984).

5/ The State explains that during the 180-day period the State was required to examine more than 8,000 Native allotment applications, determine outstanding applications, identify the location of allotment claims on the ground, determine the existence of conflicting public interests in access, and prepare the protests. The State argues Congress was "aware of the large number of pending allotment applications" at the time of passage of ANILCA and that Congress would, therefore, only require a "moderate standard of specificity," rather than exacting detail.

assure a reviewing body that the state had considered the factual situation of each individual protested allotment and had found facts indicating interference with public access." 6/ The State argues Congress was concerned the State might simply file a "mass protest," and contends that a protest is required to be only "sufficiently specific to reasonably assure that the allotment application had received individual consideration." The State argues its June 1981 protest meets this standard where it "stated that the allotment interfered with access to sport and subsistence fishing and noted the existence of an [ADF&G] fish weir and cabin on the allotment property," and that the references to a boat launch and highway were "expected mistakes considering the location and surroundings of the allotment site." 7/ The State notes the land included in the allotment application provides access to the Chilkoot River and to the eastern shore of the Chilkoot Lake northwest of the allotment site, and alleges this fact was recognized by the BLM examiner. 8/

The State also contends its June 1981 protest was sufficient under section 905(a)(5)(C) of ANILCA, 43 U.S.C. § 1634(a)(5)(C) (1982), which applies where: "A person or entity files a protest with the Secretary stating that the applicant is not entitled to the land described in the allotment application and that said land is the situs of improvements claimed by the person or entity." The State argues that it complied with this statutory provision by noting the existence of the ADF&G cabin, a "state-owned improvement," in its protest.

In a supplemental statement of reasons, the State contends BLM was also required to adjudicate the Williams allotment application under section 905(a)(4) of ANILCA, 43 U.S.C. § 1634(a)(4) (1982), because the land had been "validly selected" by the State on or before December 18, 1971, regardless of whether the State would ultimately be entitled to the land. The State cites Oleanna Hansen, 84 IBLA 150 (1984), and Daniel Johansen (On Reconsideration), 54 IBLA 295 (1981), in support of this argument. The State seeks reversal of the February 1985 BLM decision and a remand to BLM for an adjudication of the Williams allotment application.

6/ The State argues Congress was not concerned with the accuracy of protests, as no mechanism for screening protests on the basis of accuracy was provided in the statute.

7/ The State states it had originally believed the allotment site was crossed by a highway and was used for boat launching, given the presence of the river and a public easement across a private subdivision "up to the allotment property." The State also states the fish weir (a structure spanning a stream used to control the movement of fish for counting purposes) was built across the Chilkoot River "in 1976" and the cabin, used to house a field crew, was built pursuant to a special land use permit issued to ADF&G by BLM on May 1, 1976.

8/ In actuality, the BLM examiner, in the Land Report, at page 2, noted the area along the shore of the Chilkoot River has been heavily used by Natives and non-Natives for fishing and the land across the river from the allotment site has a heavily used campground. The examiner recommended that, if the land was conveyed, BLM should reserve a 100-foot strip "between the Chilkoot River and the subject allotment." Id. Thus, the BLM examiner recognized public "use" of a portion of the Williams allotment.

Both the allotment applicant and BLM have filed responses to the State's statement of reasons, contending neither the State protest nor the State selection constitute a legal impediment to legislative approval of the allotment application pursuant to section 905(a)(1) of ANILCA. In particular, the allotment applicant argues the State protest should be adjudged according to whether it has or has not complied with the statute, not because of any "justifications" for the protest offered by the State. We agree.

[1] We, therefore, turn to the question of whether the June 1981 protest by the State was sufficient under section 905(a)(5)(B) of ANILCA to preclude legislative approval of allotment application A-61299. That statutory provision requires three affirmative statements, i.e.: (1) A statement that the land described in the allotment application is "necessary for access" to certain public (State or Federal) lands, resources, or bodies of water as enumerated in the statute; (2) a statement setting forth with specificity the facts upon which the conclusions concerning access are based; and (3) a statement that "no reasonable alternatives for access exist." We conclude the State fulfilled those statutory requirements.

The June 1981 protest contained the requisite allegations that the land described in the allotment application was "necessary for access" and that "[n]o reasonable alternative for access exists." The protest did not specify what public lands, resources, or bodies of water would benefit from access or explain why access was "necessary" or why no reasonable alternative for access exists. However, the statute does not require such specificity for the first and third requirements. 9/ An affirmative statement in the words of the statute sufficed. We note the February 1985 BLM decision did not fault the State protest on either of these grounds. Compare with State of Alaska, 70 IBLA 369, 370 (1983).

BLM summarily dismissed the State protest because it failed to provide "specific facts upon which the conclusions concerning access are based." In the words of the statute, the State is only required to specify those facts "concerning access." It is unclear what is meant by that phrase and the legislative history of ANILCA is virtually silent on this point. The Senate report states only that the State must specify those facts "concerning interference with access." S. Rep. No. 413, 96th Cong., 2d Sess. 285 (1980), reprinted in 1980 U.S. Code Cong. & Ad. News 5070, 5229. In view of the limited legislative guidance, we are hesitant to read too much into the statutory

9/ The Senate Report interpreted the statutory language as requiring: "All protests by the State must set forth in detail the facts upon which the conclusions concerning interference with access and absence of reasonable alternatives for access are based." S. Rep. No. 413, 96th Cong., 2d Sess. 285 (1980), reprinted in 1980 U.S. Code Cong. & Ad. News 5070, 5229. However, the statute merely requires that the protest "states with specificity * * * no reasonable alternatives for access exist." 43 U.S.C. § 1634(a)(5)(B) (1982). In its brief, the allotment applicant would go further and require the State to address other alternatives for access, in effect establishing that the asserted access is the only reasonable alternative. The statute does not require such proof be stated in the protest.

language. Accordingly, a State protest will be considered sufficient if it specifies the nature of any use of the lands subject to a Native allotment application for purposes of gaining access to any public lands, resources, or bodies of water, which could be jeopardized by conveying the land out of public ownership. In effect, under section 905(a) of ANILCA, BLM has a responsibility to the State and its citizens with respect to access to public lands, resources, and bodies of water as well as allotment applicants. BLM must, therefore, be reasonably assured that the State has identified a public interest in an access which conflicts with the allotment. We believe this interpretation is fully consistent with the purposes of section 905 of ANILCA.

As we noted in Eugene M. Witt, 90 IBLA 265 (1986), one of the primary purposes of section 905 of ANILCA is to expedite the resolution of Native allotment claims as well as claims by Native village and regional corporations pursuant to ANCSA. See S. Rep. No. 413, 96th Cong., 2d Sess. 237-38 (1980), reprinted in 1980 U.S. Code Cong. & Ad. News 5070, 5181-5182. However, as stated in the Senate report: "The statutory approval implemented by section 905 is intended to summarily approve allotments in all cases where no countervailing interest requires full adjudication." (Emphasis added.) Id. at 238, reprinted in 1980 U.S. Code Cong. & Ad. News 5070, 5182. Accordingly, a State protest will preclude statutory approval of a Native allotment application where it is sufficient to identify a "countervailing interest." Such interest is not necessarily an interest which (in the absence of the allotment claim) could ripen into a property right in the land. It is merely an access which could be jeopardized by conveyance out of public ownership. Where the State has identified such an interest before the land is conveyed to the allotment applicant, BLM is required to adjudicate the validity of the allotment application, and the applicant is required to submit his proof of compliance with the Act of May 17, 1906, and implementing regulations. As we said in Eugene M. Witt, 90 IBLA 330, 336 n.4 (1986), if the applicant has alleged compliance, this burden "would not be considered particularly onerous."

We conclude the State protest now before us complies with section 905(a)(5)(B) of ANILCA. The protest specifies the land described in the allotment application is used for purposes of a "highway," "boat launch," "trail," and "[r]oad access to sport and subsistence fishing [and a State] weir cabin." The protest does not specify the location of any of the identified access routes, and is admittedly in error with regard to the highway and boat launch. However, it was not necessary for the State to identify the specific location of the access routes for independent verification by BLM. Indeed, the statute does not require such verification. It was sufficient that an access route which would conflict with the allotment was identified in the protest. This requirement was satisfied by reference to the access route (although admittedly not a road) to the Chilkoot River for sport and subsistence fishing. The State has complied with the statute by providing facts "concerning interference with access." 10/ The land report included in the record recognized the public use

10/ Of course, the State protest would properly be rejected if it alleged nonexistent facts or the protest were found to be entirely in error. An allotment applicant should not be put to the proof of compliance by a protest utterly lacking in any merit, e.g., where the State has identified no legitimate public

of the strip of land along the Chilkoot River within the allotment area. The examiner even noted that there was "evidence of fishing activity along the Chilkoot River" (Land Report at 1). Accordingly, we conclude that the State protest was sufficient to preclude legislative approval of Native allotment application A-61299. This is consistent with our holding in Edward A. Nickoli, 90 IBLA 273, 274 (1986), where we found a State protest sufficient which merely "stated that the lands sought by Nickoli were used for an existing trail and for a public easement to be reserved under section 17(b) of [ANCSA], 43 U.S.C. § 1616[(b)] (1982)." 11/

[2] In view of our resolution of the question of whether the State protest was sufficient under section 905(a)(5)(B) of ANILCA, it is unnecessary to address the other issues presented by the case if a sufficient and timely protest has been lodged. Section 905(a)(5) of ANILCA provides that Native allotment application A-61299 "shall be adjudicated pursuant to the requirements of the Act of May 17, 1906, as amended." Pedro Bay Corp., 88 IBLA 349, 353 (1985); Walter Titus (On Reconsideration), 77 IBLA 321 (1983).

In its December 3, 1975, decision BLM determined the Williams allotment application does not comply with the statutory and regulatory requirements regarding use and occupancy of the land. Under section 3 of the Act of May 17, 1906, an allotment applicant is required to establish substantially continuous use and occupancy of the land for 5 years. See also 43 CFR 2561.0-5(a) and 2561.2; Ouzinkie Native Corp. v. Opheim, 83 IBLA 225 (1984), and cases cited therein. However, the record also contains a May 27, 1983, affidavit of Dora A. Williams, the wife of George E. Williams, which states her husband went to the allotment site "at least a few times each month" starting "around 1950 * * * until 1964," and the people of Haines, Alaska, "respected this land as my husband's." This contradicts the finding of the BLM examiner that there was no evidence of use and occupancy of the land by the allotment applicant. 12/ As presently constituted, the record presents clear and unresolved issues of,

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fn. 10 (continued)
interest in access. In United States v. Napouk, 61 IBLA 316, 322 (1982), we dismissed a State protest as "legally insufficient" where the protest and the allotment application were concerned "with two different tracts of land."

11/ The case indicates the State used the same protest format in other cases which have been before the Board.

12/ In the Land Report, at page 1, the BLM examiner stated:

"There was no evidence of the applicant's use of the subject land. The foundation of a cabin or smokehouse was found but this structure had not been used in the last 20 years or more. The structure was completely collapsed and rotted so that only a pit remained with some decomposed wood around the side of it. This building was located about 75 feet north of M.C. 2, U.S. Survey 4514. There were no other structures or remnants of structures on the land.

"There were numerous trails from the Chilkoot River into the dense forest but all of the trails appeared to be bear trails. No evidence of any human use was found on the trails or adjacent to them.

"There was evidence of fishing activity along the Chilkoot River. There were human tracks in the mud and a few pieces of broken monofilament fishing line along the shore. The examiner also saw some men fishing in the river adjacent to the subject allotment.

material fact regarding the allotment applicant's compliance with the Act of May 17, 1906, which must be resolved by a Government contest pursuant to 43 CFR 4.451. 13/ Indeed, the allotment applicant or his successors in interest are entitled to a hearing in such circumstances. Pedro Bay Corp., supra. Accordingly, we will set aside the February 1985 BLM decision and remand the case to BLM for initiation of a Government contest of Native allotment application A-61299. A copy of the complaint will be served on the State, which shall be afforded an opportunity to intervene in the contest proceedings upon the filing of a proper motion.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is set aside and the case is remanded to BLM for initiation of a Government contest.

R. W. Mullen
Administrative Judge

We concur:

Anita Vogt
Administrative Judge
Alternative Member

Gail M. Frazier
Administrative JudgE

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fn. 12 (continued)

"The examiner did not see any corners which were posted by the applicant.

"Of the evidence of use found on the subject land, none could be attributed to the applicant. The applicant claimed hunting and trapping as uses. The examiner found no sign of trap sets or of poles used for hanging game. There also were no campsites or firepits on the subject land."

13/ In addition to the question of whether the allotment applicant used and occupied the land in compliance with the statute, the BLM examiner suggested the applicant had "abandoned the use of the land," apparently because he had not claimed use from the time he filed his application (May 21, 1964) until he filed his evidence of occupancy (June 26, 1968). This raises the question of whether the applicant abandoned his preference right to an allotment which would have vested upon the filing of his application and with completion of the requisite use and occupancy, as discussed in United States v. Flynn, 53 IBLA 208, 88 I.D. 373 (1981). However, in order to constitute an abandonment, there must have been an "intent to abandon." Id. at 235, 88 I.D. at 388. The record provides no support for such an intent. Accordingly, we do not require the Government contest to encompass this issue.